

Property rights regime and the timing of land development in a post-transition country (Poland)

by

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Abstract

The system of property rights, the way it is organised, protected and executed affects the land development process and the timing of land development. Real options literature that explains impact of additional uncertainties connected with organisation of property right system on timing of land development concerns mostly western countries. Poland and other CEEC have some unique issues relating to ownership right system that come from post-war, communists, and transition times (previous owners, specific property titles derived from a communist era, reprivatisation, communalisation, etc.). Ownership right is perceived as a very strong right by society, what results from long time of collective ownership, and have some implications on executing property rights. Thus, this paper explains on an example of Poland, CEEC specific property right issues and analyses how it can affect the timing of land development basing on western solutions from real option theory. The topic is important because land markets are strongly influenced by institutions which may vary even in countries with the same economic and political systems like unified EU countries. Therefore, it is essential to understand past historical influence and societal background that have an effect on those institutions.

Keywords: property rights theory, the timing of land development, developers, Poland, post-transition country

JEL: K11, P14, P16, R14, R38

I INTRODUCTION

Land markets are heavily impacted by institutions. The main reason for this is that land is limited in supply and as houses are built on it, land is important to society and the economy. A bundle of rights over land is subscribed to this physical asset and determines its usage and disposal. ‘The intangibility of that which is exchanged in land markets (namely property rights), the high monetary value of those rights, and the great significance of land for individuals and their society, mean that institutions are particularly important for land markets’ (Needham & Louw, 2006, p. 76). ‘Institutions reduce the uncertainties involved in human interaction’ (North, 1990, p. 25). In a case of land markets, those institutions are formalised in legal acts, written regulations, local laws, judicial rules, contracts, or informal conventions and customs.

Following Havel (2014), we refer to this complex system of legal but also conventional rules in relation to land, which can directly or indirectly influence the land market performance as a property rights regime. The process of land development is subject to legal regulations from several spheres. Those are laws connected with property rights over land itself (e.g. constitution, civil law) and a set of legal laws that regulate the relation between an individual plot and surrounding properties (e.g. zoning law). Developers and investors have to obey and take into account many rules that derive from legal acts. These regulations influence the land development process and the timing of land development. In this article we are particular interested in the latter aspect.

The (optimal) timing of land development is of great importance for investors. It was thoroughly examined in real option theory (Titman, 1985; Williams, 1991) and its variations and developments (Capozza & Li, 1994; Capozza & Sick, 1991; Quigg, 1993). Real option theory argues that due to irreversibility of constructions, an option to develop land is valuable, and the value is higher when there is more uncertainty in the market. Investors exercise their

option by postponing development so that they can gather new information. Extensions of real option theory indicate that uncertainty may also result from regulations. For example, Wang et al. (2016) found that investors' expectations of positive or negative changes in regulations differently impact the timing of land development. Lindsay (2022) implies that in real option literature, many authors (Cunningham, 2007; Lee & Jou, 2007; Riddiough, 1997; Towe et al., 2008; Wang et al., 2016; Yao & Pretorius, 2014) find that regulations, or more broadly government actions, have the negative effect on real option values.

Institutional arrangements that may affect the timing of development, arise from external (government regulations) and internal (land as a construct of property right) factors. Firstly, different regulations from public law may accelerate or delay land development. Following examples from Turnbull (2005) some regulations imply higher costs of development (development fees, impact fees, subdivision fees, taxes on idle land, etc.) or impact directly the timing of land development, such as development moratoria in U.S. (Jou & Lee, 2009). Turnbull (2005) named also a regulatory risk, what means an additional risk resulting from the chance that a regulator may impose a new policy in the future. The author gives the example of a development prohibition on wetlands, for which an individual landowner may be waived, however it is uncertain if he/she can build until the decision is made. Not a regulation itself, but a threat of regulation makes investors to develop faster (Turnbull, 2005, p. 370).

Secondly, land itself as a construct of a property right may affect the timing of land development. Apart from its physical attributes, such as location, area with length and width, angle of inclination, fruits of the soil etc., land is also a subject to a bundle of rights that set opportunities and limitations on what can be done with it. From land as a construct of property rights result uncertainties and risk. Miceli et al. (2003) named an ownership risk that lies inter alia in an unregulated ownership, some claims, boundary encroachment, squatting, title system errors (Miceli et al., 2003, p. 73, 74). In the wider context of property rights over land, there are

additional uncertainties, like a threat of land expropriation by the state or implications of poorly defined property rights (Turnbull, 2005). Those issues, though intangible, cannot be disregarded in the land development process. They can have big consequences, such as the necessity to return the land to a previous owner. Those additional uncertainties in the development process must be considered by rational investors, who calculate the risk of the investment.

In post-socialist countries, such as Poland, property rights regimes are influenced by the past system and the transition back to democracy and capitalism. In those countries, land rights passed from hand to hand enforced by regulators. The institutions of capitalism and democracy had discontinuities and did not have time to develop but were reintroduced by Western models. ‘These adjustments [in property rights] have arisen in western societies largely as a result of gradual changes in social mores and in common law precedents’ (Demsetz, 1967, p. 350). Moreover, fast developing economies of post-transition countries coerce many land use changes and it is important to disentangle existing/potential regulatory factors that may impede the pace of land development. Therefore, in this paper we would like to focus on a wide category of property rights regime that affect the timing of land development in a post-transition country.

The research question of this article is: ‘In what way do property rights issues specific to Poland affect the timing of land development?’ To answer this question, we need to understand the relationship between institutional arrangement and behaviour of developers, and to know to what extent the Polish situation is specific and different from other countries.

The aim of this paper is to examine how in previous research and theoretical papers, title to property, ownership issues affect the timing of land development, and assess whether outcomes match Polish (and to some degree also CEEC) specific post-transition issues. Although we consider property rights in a broad range in this paper, we leave out zoning laws, which are already well analysed in the Polish literature.

The paper is organised as follows: in the first section we discuss property rights theory in the context of land. We provide examples from the literature about the impact of property rights issues on the timing of land development. In the second and third section, we show basic elements of the Polish property right system and place it in the historical context. Finally, we analyse how those past influences may affect land development and its timing today. The paper ends with a discussion and conclusion section.

II PROPERTY RIGHTS AND THE TIMING OF LAND DEVELOPMENT. EVIDENCE FROM THE LITERATURE.

2.1. Property rights over land

As mentioned above, property rights is the bundle of rights over the use of and the income derived from property and the ability to alienate an asset or a resource (North, 1990, p. 47). Legal property rights over land are very old constructs based on Roman or English Common Law. Property rights are closely related to general economic rules and mechanisms, which on the one hand set the frame for property rights, and on the other hand have developed from property ownership issues.

In economics, property rights theory was formed in 60's by inter alia Coase (1960) who explained externalities and scarcity problems. Property rights theory is one of the cornerstones of New Institutional Economy (NIE). 'Economic property rights (the ability to derive direct or indirect income or welfare from a resource or attribute of a resource) are the end-result, whereas legal rights are the means to achieve the end' (van der Krabben, 2009, p. 2872). Legitimacy of ownership entitlements and resource allocations are closely related. They reflect the different functions that property rights perform. On the one hand, they define legally sanctioned rights to land and its produce, and on the other, they act as an allocative tool for defining the access to the land resource that the entitlement confers.

According to Demsetz (1967) property right is a social construct and constitutes a foundation for a capitalist system. Using the example of American native Indians' hunting customs, the author describes how property rights emerged naturally. Property rights to land were set when the fur from hunting animals started to be commercially traded. As hunting intensified, externalities became more significant than while free hunting. The private hunting territories developed and as the next step a seasonal allotment system and inheritance were set. 'Property rights arise when it becomes economic for those affected by externalities to internalize benefits and costs' (Demsetz, 1967, p. 354) and 'when it becomes worthwhile to incur the costs of devising such rights' (North, 1990, p. 51).

As property rights need to be defined, monitored, and enforced, transaction costs emerge. 'Transaction costs can be defined as the costs associated with the transfer, capture and protection of rights' (van der Krabben, 2009, p. 2872). 'Transaction costs are the costs that are incurred to increase the information available to us and to reduce uncertainty' (Buitelaar, 2016, p. 2540). NIE economists agree that transaction costs cause inefficiencies in markets. 'When it is costly to transact, institutions matters' (North, 1990, p. 12). In the case of land markets, those costs are numerous and high. Examples are fees of real estate agents, valuers, notaries, costs of credit, title insurance, etc.

One of the conditions for market participant to act efficiently is the appropriate enforcement of property rights. On real estate markets, strong enforcement of property rights lets the owners be more secure when performing high capital transactions.

Alchian and Demsetz (1973) present ownership right as the right to use resources, to till the soil, and to sell it. This division reflects the distinction found in Roman Law that consists of 'right to use' (*usus*), 'right to income' (*usus fructus*), and 'right to transfer' (*abusus*). It is not the resource itself which is owned, but a set of rights to use a resource (Alchian & Demsetz, 1973, p. 17). With ownership right, one has a right to exclude others from using his or her good.

The rights may belong to different persons, e.g. ownership right to the land and a lease right to till the soil and sell crops. Honore (1961) applies a 'liberal' concept of a 'full' individual ownership i.e. 'those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted in the mature legal system' (Honore, 1961, p. 370). The author encompasses to the full ownership 'the right to possess, the right to use, the right to manage, the right to the income of a thing, the right to the capital, the right to security, the right or the incident of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuality' (Honore, 1961, p. 370).

How much someone may benefit from the right without interference of others, characterises the strength of the right. The strongest right is full private ownership. Close to the ownership right, but limited in time is a long-term leasehold, that is constructed differently in some countries, with the different time span.

One of the aspects of property rights is to exercise them. For example, a landowner is not obliged to exercise his ownership right by building-up his lot. Nevertheless, for some rights (e.g. easement) not exercising them for a definite period of time makes them expired.

It is the highest importance for each proprietor to have precisely delineated boundaries of property, accurately assigned rights, and legal protection of rights by state, what makes possession undisruptive, secure, and enables effective and profitable usage of this resource. Delineation of property rights refers to the way the boundaries of the bundle of rights over land or an attribute from that bundle have been drawn, that is, the conditions under which the right can be exercised (Buitelaar & Segeren, 2011). In most legal systems, property rights to land are extended above and below the ground. One may indicate it from the depths of the earth to heights of the sky (Institute, 2013). However, in most countries, this unlimited scope is constrained by public law, e.g., water rights, air rights, zoning, etc., and by private law, e.g., easements, restrictive covenants etc. According to Havel (2014) those rules set boundaries to

property rights and in that way influence land use, development possibilities, and land value. Miceli et al. (1998) underline that property rights have to be clear and well-defined in order to lower owners' and collateral holders' risk of expropriation, and to reduce transaction and foreclosure costs. Liao and Mei (1999) analyse the role of institutional factors on real estate markets in their different stages of maturity and freedom. They point out that 'due to the immobility of real property and the complexity of real estate transactions, a real estate investor needs more legal protection of the property rights' (Liao & Mei, 1999, p. 22). Buitelaar and Segeren (2011) indicate the connection between an appropriate assignment and protection of property rights and its economic value. 'If property rights are not protected, the income stream to the holder of the rights is not secured. People are likely to value the good less than they would when the use of the good is exclusive and protected' (Buitelaar & Segeren, 2011, p. 663). As noted by Cai et al. (2019), it depends on the country, how and to what extent it secures the property rights. Cai et al. (2019) after Arruñada (2012) stated that legal private property rights depend in part on public infrastructure like cadastral surveys and easily accessible repositories of information about land ownership. Djankov et al. (2022) surveyed over 190 countries about the security of the title to property. The authors indicated that police protection and several administrative processes are needed to keep better security of property titles. Those administrative processes should make information about property titles transparent, easily accessible, and universal. In addition, a straightforward dispute resolution process is essential to resolve potential real estate conflicts. Djankov et al. (2022) established that protection of title to property is stronger in countries with higher GDP, higher indices of governance effectiveness, and more human capital.

The way law protects possession has implications for the registered owners of properties. In different legal systems, autonomous or adverse possessors may acquire real property in the form of acquisitive prescription after elapse of time. Different statutes of limitations for adverse

possession are set in different countries. In the U.S. its length even varies across states jurisdictions. Another phenomenon that threatens in a similar way the established property boundaries of registered owners is squatting. It is more common in poorer countries with higher rates of homelessness, however according to Baker et al. (2001) and Miceli et al. (2003) not so rare in U.S.

Private ownership of property may also conflict with public aims. Most legal systems contain rules for the expropriation of private property for a public aim and for compensation for such a seizure. Further, pre-emption rights or compulsory purchase by the state affect private owners.

Beside all of the formal rules, that after North (1990) we can name as: written constitutions, statute, common laws, property rights, specific bylaws, every country has specific, informal rules, that constitute a property rights regime and influence the institutional climate of the property rights sphere. In the category of informal rules, North (1990) enumerates *inter alia* informal constraints, unwritten traditions, customs, taboos, conventions, norms, and codes of behaviour. Different weight may be given to unwritten contracts, how people deal with inheritance processes, how accurately public records get updated, how neighbourhood disputes are solved, etc. All these customs reflect the way how people deal with real estates and influence investors behaviour. In many cases, such informal rules are converted to formal rules in a judicial decision.

2.2. Impact on the timing of land development

In this subsection, we will discuss examples from literature that show how property rights issues impact the timing of land development. Different aspects of property rights cause uncertainties in the land development process. The literature exemplifies the following ones: ownership risk from private sources, type of title systems assurance, regulatory taking with or without compensation, and development prohibition.

The first source of uncertainty that affects development timing relates to a regulatory taking. Whether, when and where a regulatory taking can happen is difficult to predict. It is not a countable risk. However, landowners always face some threat that their land may be taken by the government for a public purpose. Innes (1997) explains the decision process of landowner whether and when to develop land under such a threat. In his example, an additional building on the coast produces a damage (externality) and costs connected with flooding and environmental harm. In this case, the government may take the land from the landowner for a public purpose. To reduce social consequences, the government may first take undeveloped land, and then developed one. When the state gives no compensation, landowners will develop earlier and more land than is optimal. As built-up plots are not taken by a state in the first round, this strategy helps landowners to keep their land from a government taking. In the case when the government pays full compensation, a landowner does not have to develop land just to preserve it. Still, she or he will build earlier because in the case of damages, she/he will be reimbursed with the costs of construction. Riddiough (1997) noted that land under a threat of taking loses its flexibility and its value decreases with the probability of a regulatory taking. Therefore, landowners develop land quicker than is optimal, in order to receive their return from improved land longer before the potential taking. Turnbull (2002 and 2005) analyses development prohibition due to environmental protection (e.g., for wetlands) as an example of regulatory taking¹. This seizure refers just to undeveloped land as an already built-up plot is not the subject of such antidevelopment rules. A landowner has guaranteed income from undeveloped land, but can gain from improved, developed land when the improvement occurs

¹ As Turnbull, G. K. (2005). The Investment Incentive Effects of Land Use Regulations. The Journal of Real Estate Finance and Economics, 31(4), 357-395. pointed out: *The line between the concepts of eminent domain and regulation is somewhat blurred [...]. When exercising eminent domain, governments take the entire value of an asset out of the hands of its owner. While the owner does not lose title to his asset under regulation, regulation is similar to a 'partial taking' in that it eliminates some, but not all, asset value from the owner's control.*

before the development prohibition. Therefore, landowner accelerate land development in such a situation.

Also, different systems of assuring land title may lead to different decisions about the timing of development. Through elapse of time, real estate has many owners that are recorded in the land register. With the longevity of buildings it happens that there are some mistakes in the title, bad inheritance procedures, omissions, etc. Miceli et al. (1998) enumerates two title systems: 'registering' and 'recording', that treat current and previous owners differently. The 'registering' system provides a certificate of ownership to the current owner. In the case of a legitimate claim, the current owner by default keeps the land and the claimant gets the compensation from the government that guaranteed the title. Under the 'recording' system, a record of owners is kept as evidence of ownership, but this record does not guarantee ownership. The responsibility for the proper interpretation of a title stays with the interested party, that can purchase a title insurance as a protection against the consequences of errors. In the case of a legitimate claim, land by default is transferred to the previous owner. Miceli et al. (2000) analyse the timing of land development under those two systems. Under the recording system, a landowner considers the probability that a claimant may take over the land. The investor will receive the appropriate compensation for any capital improvements but will lose the earnings from the land thereafter. Therefore, it is profitable to develop land faster to extend the period of receiving profit from the improved land before the potential claim happens. Under the registering system, where a landowner keeps the land, but is responsible for compensating the claimant, the pace of development is accelerated when the compensation is based on the returns in both the pre- and post-development stage. If the compensation to the claimant is for the residual income to land just in the pre-development state, the probability of a legitimate claim has no effect on the pace of development. The authors conclude that: *'in the recording system, the risk of losing the earnings from developed property functions like a uncertain cut-*

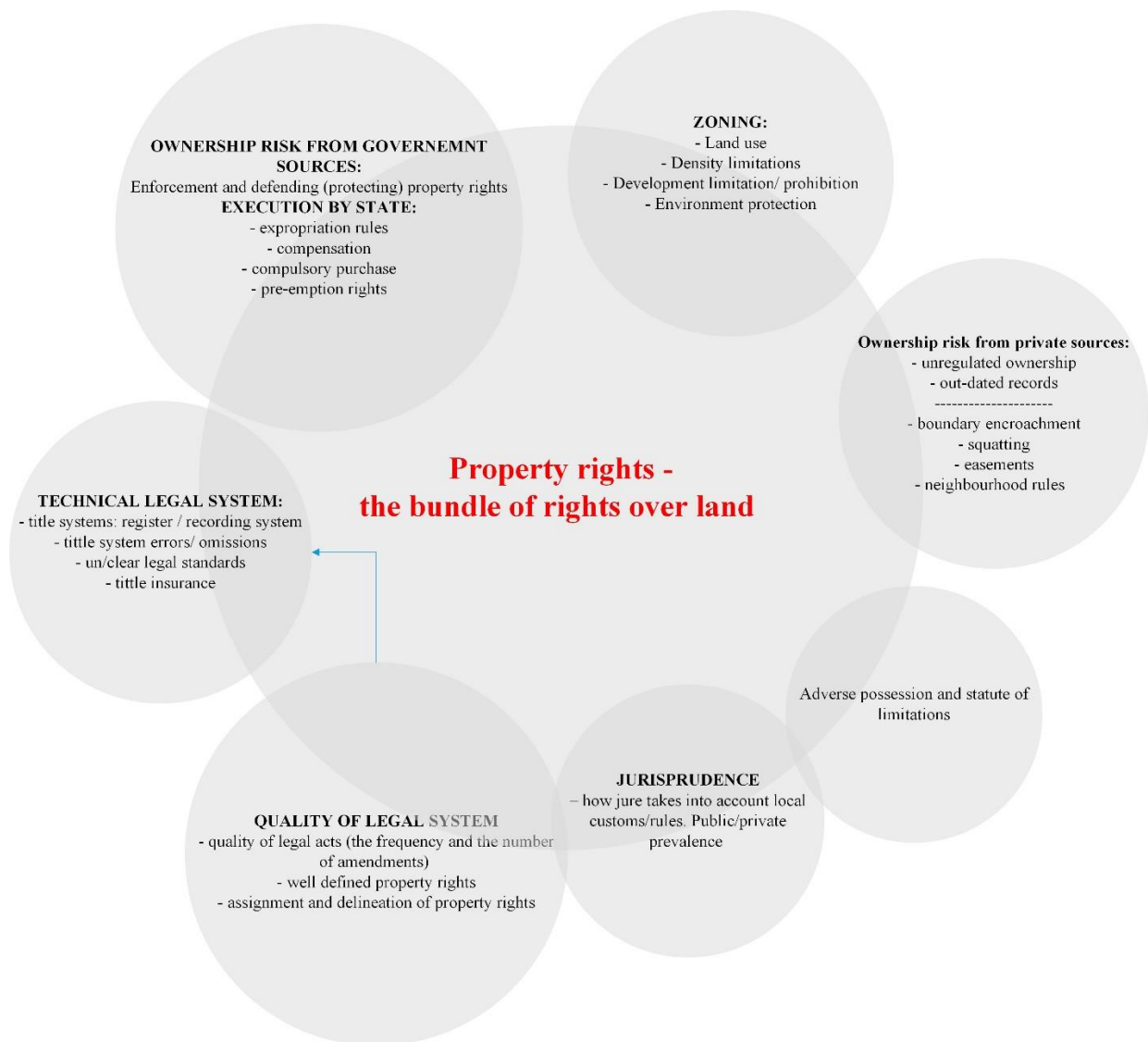
off date on the returns to investment; it prods the land possessor to develop the land sooner than he would in the absence of such risk. In the registration system, the risk of compensating a claim functions like an uncertain tax on the investment returns, reducing but not eliminating post-claim returns to the developer. As a consequence, the possibility of an adverse claim has a stronger effect on the developer's timing decision in the recording system than in the registration system' (Miceli et al., 2000, p. 387).

The next source of property rights uncertainty that affects the timing of land development lies in ownership risk from private sources. Miceli et al. (2003) enumerate ownership risk arising from title mistakes, fraud, boundary encroachment, adverse possession, or squatting. The risk depends on the statute of limitations that sets the maximum time that legitimate claimant may go to court. As the authors notice, the statute of limitations has two opposite consequences for the current owner. In the first case of past claims due to title errors or omissions, finite statute of limitations decreases the risk of the current owner. In the case of a boundary encroachment, squatting, or adverse possession, finite statute of limitations increases the risk of the present owner of being dispossessed. The authors found that 'a longer statute of limitations tends to hasten the pace of urban development while it increases or decreases the development density at locations at which the demanded density is falling or rising over time, respectively' (Miceli et al., 2003, p. 76). Jou and Lee (2018) made an extension to that study by adding an uncertainty factor, and constructed a real option model to set optimal statute of limitations under land development timing decisions in a recording title system. 'Taking the option value of waiting into account, the landowner will develop the vacant land to the point at which the value of delaying development is just equal to the net value of development. A shorter statute of limitations will expedite development because waiting becomes less valuable for developer' (Jou & Lee, 2018, p. 3). Turnbull (2005) noted that ownership risk arising from private sources hastens the timing of land development, similar to the risk from public sources.

The type of title to land is important for the timing of land development. We mean here other land titles than ownership right, such as long-term lease rights. Despite of their limited term, they allow investors to build-up land and gain rent incomes safely and over a long period. Long-term lease rights vary in their names and structure between countries. Usually, their terms are between 30 and 99 years. Closer to 100 years, investors treat them almost like perpetuity, similarly to the unlimited ownership right. However, the time constraint and other requirements imposed by the owner onto the leaseholder should affect investment calculations and the timing of land development. Yao and Pretorius (2014) noted that real option models assume freehold lands, but in most countries, land with long term leases is managed by state agencies. Therefore, the authors by applying financial option pricing method empirically tested development investment on long term lease right in Hong Kong employing the perpetual American call model. They found that developers seemed to exercise their development option earlier than optimal. Reyman and Maier (2023) in their survival model find that Polish investors that hold perpetual usufruct right to land, developed land slower than ones with ownership right. This outcome is counterintuitive, as perpetual usufruct was implemented with the aim to force developers to develop land in a specific period of time. One explanation for that phenomenon may lay in the passive role of Polish municipalities that refers to enforcing perpetual usufruct contracts as well (Reyman, in preparation).

In general, we conclude that uncertainties originating from property rights accelerate land development and lead to sub-optimal construction.

Figure 1: Property rights as a source of uncertainty and risk.



Source: Own work.

III PROPERTY RIGHTS OVER LAND IN POLAND. BACKGROUND.

In Poland, property rights are organised based on Roman Law and on the Napoleon Code. Gniewek (2020) indicates that property rights originate from civil law, but expanded into other branches of law, such as constitutional law, administrative law, financial law, and criminal law. Rules for possession, ownership right, perpetual usufruct right, and limited property rights are provided by Act Of 23 April 1964 Civil Code.

Ownership right is the fullest right to a thing. It is a superior right in rem (obviously of an absolute nature), covering the widest range of rights, albeit within certain limits (Gniewek, 2020). It is protected by the Constitution of the Republic of Poland. Article 20 of the Polish Constitution says that: *‘A social market economy based on [...] private property [...] shall constitute the basis of the economic system of the Republic of Poland’*. Further, *‘The Republic of Poland protects property and the right of succession’* (Article 21). *‘Property may be restricted only by statute and only to the extent that it does not violate the essence of the right to property’* (Article 64(3)). Land may be expropriated by the state only for the public purpose. The Polish Constitution also guarantees a just compensation for expropriation. Article 21 of the Constitution of the Republic of Poland provides: *‘Expropriation may be allowed solely for public purposes and for just compensation’*. Polish Civil Code protects possession of property without a legal ownership title. According to Gniewek (2020, p. 356), the uniformly prevailing view in case law is that possession is a de facto state of affairs, albeit with specific legal effect. *‘A holder of immovable property who does not own the real property, shall acquire ownership thereof if he has been in possession of it for a continuous period of twenty years as a spontaneous possessor, unless he acquired possession in bad faith’* (article 174(1) Civil Code). Further, one who possesses property in a good faith is not obliged to pay any compensation for using or damaging the property till the time when the owner sues him for recovery. When a building is erected on someone else’s land, and the value of the building is significantly bigger than that of the land, the holder is entitled to request the transfer of the occupied plot of land for an appropriate remuneration.

Gniewek (2020) noted that the perpetual usufruct right, a right in rem derived from the Roman Law of emphyteusis, was first treated as limited rights in rem and then closer in the meaning to the ownership right but with finite time. This right is regulated in the Civil Code and in the Land Management Act. In 1961, the instrument of perpetual usufruct right was established

mainly for residential buildings. Later, its function was extended to others forms of buildings (Gniewek, 2020). Only land that belongs to the state or a local authority unit may be given in perpetual usufruct. When a building is erected on such land, it belongs to the perpetual usufructuary, who has then a separate ownership right on the building. This is an exception of the Roman rule *superficies solo cedit*. Perpetual usufruct is a long-term right that is legislated for 99 years or shorter in an exception, but minimum for 40 years. Contracts for perpetual usufruct shall include a provision about property usage, therefore this right is purposive. In the case of developable land, the agreements specify the type of building and the timing of development. The perpetual usufructuary is obliged to pay a first fee (15-25% of the real estate price) and annual charges for the whole period of the time of the right. If the perpetual usufructuary uses land differently than agreed, the owner may impose an additional fee or terminate the agreement. By default, state or local government units prolong the right on the application of a user. A refusal of an extension is only permitted on grounds of important public interests. The law protects the perpetual usufruct right in a similar fashion as the ownership right. As of 2018, around 12% of state land is in perpetual usufruct according to calculations by Trojanek (2020). The land area in perpetual usufruct steadily decreased since 2000. In part, this is the result of a legal act that allows perpetual usufructuary to converse this right into ownership right. Since 2018, it can be executed *ex lege* for residential land. Although perpetual usufruct of land for housing purposes is still a legal option, municipalities do not apply it anymore (Reyman, in preparation). Currently, legislators prepare the same solution for land with all other designations. This will result in the total liquidation of perpetual usufruct right in Poland.

Polish Civil law also regulates neighbouring relations over land. Enforcement of property rights is managed by Civil and Administrative Courts.

Poland has a registration system assuring land title. The Polish legal system of land and mortgage registers is built on the premise that 'land and mortgage registers' are kept to establish the legal status of real estate (Gniewek, 2020). The 'land and mortgage register' system is managed by the civil courts. Additionally, there is another type of general official register in the form of a 'register of land and buildings' kept by municipalities. The data (information) of factual nature contained in 'the land and building register', in turn, constitutes the basis for economic planning, spatial planning, tax and fee assessments, land registry designation, public statistics, real estate management and agricultural land registration (Gniewek, 2020, p. 334). A warranty of public credibility of 'land and mortgage registers' holds true. In the first place, the classical effect of the warranty is the effective acquisition (in confidence in the content of the land and mortgage register) of the disclosed ownership right or other transferable right in rem (Gniewek, 2020, p. 358). However, there are some types of notations that are not guaranteed by 'land and mortgage registers', such as: rights encumbering the real estate by law, annuity contracts, easements established on the basis of a decision of the competent state administration authority, as well as easements of a necessary road or established in connection with crossing the border when erecting a building or other device, transmission easements.

IV POLISH PROPERTY RIGHTS REGIME – SOME REMAINS AFTER SYSTEM TRANSFORMATION. EVIDENCE FROM THE LITERATURE.

Some specific elements of the Polish property rights regime originate in historical events, such as the Second World War, the communist period, and the transition back to a capitalist system and to democracy. A second source of specific Polish elements are specific legislation, organisation of property rights system, conventions, customs, and believes.

Many Poles were expropriated during the Second World War. Although they should be compensated, Havel (2020) states that restorations of land to Jews are still unregulated. She pointed out that many buildings in Warsaw were restored to previous owners or their heirs.

However, in some cases the ‘small restitution’ law was abused by specialised companies that focused on buying claims and corrupting officials to gain compensations. Zaleczna and Havel (2008) indicated that there is only one proper legislation act that provides the ground for previous owners or their heirs to restore or be compensated for properties located in the former Polish territory beyond the Bug River.

Zaleczna and Havel (2008) pointed out that restitution after nationalisation of land without any compensation in communist times has not yet been properly conducted in Poland. Authorities estimated that properties should be restored to round 170 000 people and that compensation amounted to about 140 billion PLN in 2008 (Załączna, 2014b). Zaleczna and Havel (2008) indicated a lack of consensus among political elites about proper solutions for restitution issues. This reflects an attitude of the Polish society that with the elapse of time is less in favour of compensating previous owners, due to budget constraints, and to the influence of some politicians.

In the transition from the communist system, which started in 1989, land was transferred to the private sector through restitution and privatisation. Municipalities obtained legal entities and received land from the state through a communalisation process. According to the report of the National Council of Regional Accounting Chambers (KRRIO, 2022) this process of transferring properties to municipalities has still not been formally completed in many cases. This causes complications in the management of this property. The instrument of perpetual usufruct played an essential role in the process of enfranchisement of state and municipal legal entities (Trojanek, 2020, p. 8549). Especially land that was previously owned by a state enterprise was often granted a perpetual usufruct. The aim of perpetual usufruct was usually expressed vaguely, like *use according with the purpose and maintenance of the buildings in good condition*. Therefore, nowadays there are problems with the interpretation of those expressions. Moreover, it turns out that still valid aims of perpetual usufruct granted in the

1990s are often in conflict with the changed surrounding of the property and / or with the local development plans.

Havel (2014) summarized that as compared to Western countries, some different, fuzzy, ambiguous forms of property rights emerged in CEEC. The term of fuzziness of property rights was coined by Burawoy and Verdery (1999) and referred to the lack of rules and practices in dealing with property rights due to the communist history of those countries. Miceli et al. (2003) make similar statements about clouded ownership claims and uncertain property boundaries that arose in countries with periodic civil disturbances.

These issues with property rights originated from historical and past political events. Almost all of the events mentioned by Papageorgiou and Turnbull (2005) occurred in Poland: namely governmental abrogation of prior land grants and the destruction of records from war. They are all possible sources of conflicting claims to land ownership. The problems are aggravated by a large share of absentee owners. Due to various waves of emigration from Poland, owners of property are sometimes not physically present.

Interesting property rights issues originate from specific Polish legislations. In 2003, the Road Special Legislation was enacted to enable faster construction of roads. The decision to authorise the realisation of a road investment is a special act. 'It combines the sovereign elements of various types of administrative decisions made on the basis of the provisions of other acts, including decisions on the location of a public purpose investment, construction permits, expropriation of real estate, division of real estate, restriction of the use of real estate' (Polanowski, 2020, p. 71). Proceedings to establish amount and payment of compensation due to the expropriated owner of the property does not suspend the process of execution of the road investment and commencement of construction works. The rules for establishing a market value, which constitutes the basis for compensation, are interpretable and problematic even for property valuers. According to the Land Use Planning and Development Act (2003), if the value

of real estate declines due to a change of provision of the local development plan, and the owner sells the property within five years from establishing zoning, the owner may claim a compensation to the municipality for a loss of value. In the opposite case, when the value of real estate increases due to new or changed zoning, the owner must pay a planning fee, that equals to maximum of 30% of a value surplus, if it is imposed by a municipality in the zoning plan. Śleszyński et al. (2021) indicate unequal weight for those two mechanisms, with prevalence of landowners. Further, they state that this regulation is close to that of the United States, which more broadly emphasizes the need for compensation for planning restrictions in development, and the approach of the Netherlands, emphasizing the rights of the landowner to its increased value because of the provisions of spatial plan (Śleszyński et al. (2021) citing Jacobs (2008) and Muñoz-Gielen (2011), pp. 17).

One example of improper execution of property rights is the updating perpetual usufruct fees by a state and municipalities. For many years, annual fees for perpetual usufruct have not been regularly updated. After a real estate boom in 2008, they were revised based on valuation reports. That resulted in an enormous increase in annual payments and many lawsuits against municipalities by investors. The Constitutional Court described the updating procedure as 'hybrid and unusual' (Załączna, 2014a).

The 'land and mortgage register' and the 'register of land and buildings' exist in parallel. Those registers do not communicate with each other. In the case of changes in land such as change of the owner, change of boundaries, etc., a party is asked to update the other register and failing to do so is punishable with a fine. However, this regulation is not executed. The way Poles treat updating registers, deal with succession, clean some past entries in registers is far from accurate and punctual (Reyman, in preparation).

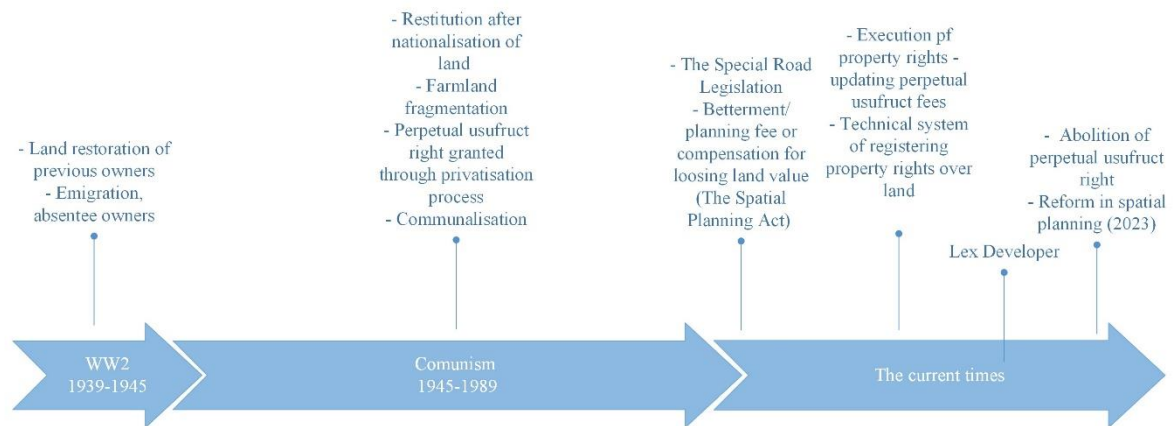
Havel (2020) notes that Poles' belief in very liberal and strong ownership right is reflected in the expression 'holy ownership right'. The property rights approach, that has arisen from this

conviction, gives an unconstrained and absolute right with unlimited scope to ownership. The author notes that this approach constitutes a different attitude to modern European countries. Belief in unrestricted property right is reflected in jurisdiction, e.g., in court cases where local spatial development plans infringed the subjective rights of a landowner. The analysis of jurisdiction in those cases showed that, to some extent, courts attach very high meaning to the rights of property owners (Nowak et al. (2020); Foryś and Blaszkę (2021); Nowak (2021); Foryś and Nowak (2022); Zybala (2019)). Zaborowski (2021) argued that *‘after the 44-year period of the Communist regime, associated with restrictive top–down planning, Polish society perceived democracy and capitalism as unrestricted freedom based on the free market principle’* (Zaborowski, 2021, p. 19). Belief in the ‘holy ownership right’ is reflected in the way how the Polish spatial management system is organized, which provides compensation for owners whose land loses value due to changes of the spatial development plan. The Polish spatial management system strongly protects real estate owners’ rights (Śleszyński et al., 2021, p. 3). Compared to other European countries, compensation is perceived as excessive in Poland. Similar to other authors, Śleszyński et al. (2021) explain this very liberal approach by the return to a free-market economy with property rights after a long period of communist rule.

The figure 2 shows both the consequences of the past events and the current institutions that influence property rights in the timeline. We can see that important and weighty institutions are still being changed and shaped, such as the current reform of spatial planning and the abolition of perpetual usufruct right.

Figure 2: Events and institutions on the timeline.

Events and institutions on the timeline



Source: Own work.

In this paper, we investigated those elements of the property rights regime for Poland. Due to the common history, however, it may be similar in other post-socialist countries.

V LINKAGE OF THE POLISH PROPERTY RIGHTS REGIME WITH THE TIMING OF LAND DEVELOPMENT.

We compiled the most specific and important elements of the Polish property rights regime that were described in the previous section in the Table 1. The particular institution is ascribed to the type of formal or informal category using the grouping of North (1990). In columns 3-5, we list possible consequences and effects of those institutions on land development in general and on the timing of land development using literature evidence, where possible.

Table 1: Elements of property right regime and its impact on land development

Specific elements of property right regime / event	Type of institution	Present consequences	Effect on land development	Possible effects on the timing of land development
1. Restitution of previous owners:	Historical / past influence			
1.1. During WWII 1.2. After nationalisation in communist period		<ul style="list-style-type: none"> - ‘Small restitution’ process - Claims from previous owners or heirs - Current restitution debate - Uncertainty upon future restitution solutions and legislations 	<ul style="list-style-type: none"> - Higher risk for investors (Zalczna & Havel, 2008), but also - Rapid development and building on questionable land in 90’s (Havel, 2014) 	Similar to the threat of regulatory taking (Riddiough, 1997) – fasten land development. However, here when solutions for restitution are unknown, it is hard to say, whether in a case of legitimate claim land had to be returned or compensation will be paid to previous owner
		Farm land fragmentation (Van Dijk & Kopeva, 2006)	Additional transaction costs (cooperate with many heirs, additional time and costs of searching for all land owners and make contracts with them)	Delay or deter land development
2. Communist system residues and transformation	Historical / past influence			

2.1. Perpetual usufruct right granted through privatisation process		<ul style="list-style-type: none"> - Unprecise notations of the purpose of the use of the land in perpetual usufruct contracts - Purposes of the use of land from 1989 do not abide with current landscape and zoning - A threat of lawsuit by landowner 	<ul style="list-style-type: none"> - No consequences for issuing building permit decision (Kuryśko, 2018) - Using land by current investors in contradiction with aim of perpetual usufruct - In practice, landowners do not sue perpetual usufructuaries 	<ul style="list-style-type: none"> - Additional time and information costs for disentangle those contradiction for investors implicate delays. - For foreign investors it can result in determent
2.2. Communalisation		<ul style="list-style-type: none"> - Not all land is handed to municipalities yet - Unregulated land statutes 	<ul style="list-style-type: none"> - Some possible issues when building next to neighbour with unregulated land - Lack of possibility to acquire this land 	Delays in development
3. Emigration and absentee owners	Past		<ul style="list-style-type: none"> - Adverse possession - Statute of limitation - Past claimants 	Threat of being dispossessed (Miceli et al., 2003) by absentee owner
4. Perpetual usufruct granted in tenders (not in enfranchisement decision in 1989)	Property title	Time limited title to land		<ul style="list-style-type: none"> - According to Yao and Pretorius (2014) investors with a long term lease title seem to exercise their option to build earlier as they take into account timeliness of right, but Polish perpetual usufruct seem to be different from Hong Kong one, as it lasts 99 years and is prolonged by default by a state or municipality

				- Delays development comparing to ownership right
	Convention (execution of right)	- Sudden increase in annual payments - Rough estimations of future annual costs of right - Regulator unpredictability		- Higher costs of holding land should fasten the land development for owner occupied properties. - For developers that want to keep and gain rents from improved land, bigger costs resulting from an increase of annual fees should not be so significant so as to fasten development much
5. Betterment/ planning fee (Spatial planning Act)	Law	Additional fee	Higher costs	- Higher costs (additional fee) in general slow development pace (Turnbull, 2005) - In case of planning fee that is imposed in the case of selling real estate up to 5 years, investor may wait this time to avoid paying this fee
6. Compensation for loosing land value due to changes in Spatial plan (Spatial planning Act)	Law	Compensation for the lost value	E.g. limited development	Similarly to the threat of regulation (Turnbull, 2005) investors should develop land earlier, as compensation for the lost of

				value will not cover the loss of future profits
7. Expropriation of property for the construction of public roads (Special Construction Roads Act)	Law	<ul style="list-style-type: none"> - Threat of expropriation - Vague rules for establishing compensation 		Determent of land development
8. Special Housing Act ²	Law	Facilitate housing development (Załączna & Antczak-Stępniak, 2022)	Enable housing developers to 'correct' local plans outside the binding plans amendment procedure (Załączna & Antczak-Stępniak, 2022)	Fasten development
9. Technical system of registering property rights	System	<ul style="list-style-type: none"> - Two registers: land and mortgage register and register of land and buildings - Checking two registers kept by two different institutions: courts and counties - Resolving ambivalence when notations in two registers do not match 	Additional time and costs	Delays development
10. The way people give importance to update records/ conduct succession proceedings,	Customs	<ul style="list-style-type: none"> - Not up-to-date land and mortgage book records - Claims from heirs 	Additional time and costs with rectification of entries in the land register	Delays development

² The act of 5 July 2018 on facilitations in the preparation and implementation of housing investments and accompanying investments, (2018). , ibid.

and the way it is executed by officials				
11. 'Holy ownership right'	Belief	Jurisdiction in favour of land owners	'Everybody Has the Right to Develop' (Havel, 2020)	Delays land development – with so liberal approach to property rights investors may wait and execute their best option to build

Source: own work.

This section describes possible consequences of peculiar elements of the Polish property rights regime, as compiled in Table 1, on investors' risks and the timing of land development. Restitution to previous owners may have consequences for the present legitimacy of claims on land. As the restitution process is not yet finished in Poland, the current debate about this topic adds uncertainty about future restitution solutions. This results in a higher risk for investors (Zaleczna & Havel, 2008). However, it seems that in the 1990s, at the beginning of the transformation period in Poland, uncertain property rights were not an obstacle for investors. They built despite of unsettled and questionable ownership status of the land (Havel, 2014). The most likely reason is the very high rate of return on investments in countries in transition at that time. This lets international real estate developers "to overcome the 'blurred' property rights and used the weakness in delineation of property rights for their advantage, taking into consideration their business localization decisions and participation in the provision of urban infrastructure' (Havel, 2014, p. 624).

We may consider the effect of the restitution process on the timing of land development from two contexts. On the one hand, the threat of a previous owner's claim for a current investor may work similar to the threat of a regulatory taking (Riddiough, 1997) and accelerate land development. As when an investor does not know when land may be taken, he or she prefers to develop it faster to extend the period of profit from the land improvement. On the other hand, the investor may consider the way how authorities have been working on restitution and the solutions they have elaborated so far. From this perspective, it is hard to predict in which way restitution will go, and what rules will oblige. It is unclear, whether real estate will be returned to the previous owner and the current owner will be compensated for improvements, or whether real estate will stay with the current owner and compensation will be paid to the previous owner. It is also not clear if and what the statute of limitations will be set.

Van Dijk and Kopeva (2006) point out the problem of farmland fragmentation that applies to many CEE countries. Previous owners usually had already left heirs and the restored land had to be allocated between them. Nowadays, this fragmentation of farmland results in delays in land development, as investors need to spend more time and money for acquiring information to contact heirs and arranging contracts with all of them.

Perpetual usufruct rights granted in 1989 through the privatisation process in enfranchisement decisions include unprecise or unclearly formulated goals. Consequently, developers now may use land in contradiction with its aim and/or with the designation of the local development plans. However, it is not an obstacle for obtaining a building permit, as authorities issue building permits independently from the title to the land after a positive verification of compliance of the investment with the local zoning. Still, landowners may always demand the right performance of contract provisions and sue a perpetual usufructuary if he or she fails to do that. According to Kuryśko (2018), the courts in Poland dismiss those kinds of action. Yet, any information about pending legal proceedings is recorded in the 'land and mortgage register', what may discourage developers' clients from purchasing residential units on such property. Concerning the timing of land development, this should lead to delays as the investor needs time and practical knowledge to disentangle those obvious contradictions.

The way how regulators revised perpetual usufruct fees in the past and the large number of lawsuits by perpetual usufructuaries resulting there, may indicate unpredictability of regulators' actions. For investors, this always means uncertainty and higher risk. The expected implication of raised annual fees for land on the timing of land development, is faster construction, as the costs of holding land empty rise. Developers who sell improved land, will request higher fees from future purchasers.

The consequences of the following legal acts will be a slower pace of development. Firstly, provisions of the Spatial Planning Act, namely imposing a betterment or planning fee will work

the same as analysed by Turnbull (2005). Development fees will slow the pace of development. A threat of regulatory taking due to the road construction according to the Special Building Roads Act deters land development.

The technical system of registering property rights, which consists of two registers, the 'land and mortgage register' and the 'register of land and buildings' can result in some minor delays. Additional time and costs are needed to check those registers and eventually resolve ambivalences when the notations are not consistent. Similar consequences come from the negligence in updating records, and/or in conducting succession proceedings, and the way it is executed by officials. Regulations state that documents should be updated without 'unjustified delay'. This term does not allow for proper execution of penalties for delayed updates. This results in discrepancies in the public records.

The belief in a 'holy ownership right' is noticeable when there is a clash between individual and public rights, as often happens in relation with spatial planning. It is a common perception that local development planning should not intervene much in individual property rights. When it does, there is always the possibility to appeal. Jurisdiction leans in favour of owners. The belief in 'holy ownership right' is also shared by many officials so that they issue Land Development Decisions in a very liberal way. The Land Use Planning and Development Act of 2003 states that *'everybody has the right to develop'*, what is according to (Havel, 2020) a good reflection of landowners' building freedom and liberty.

VI SUMMARY AND CONCLUSIONS

The property rights regime in Poland is liberal and influenced by various historical and political events. This results in entries in 'land and mortgage registers' and possible claims from previous owners. Unresolved restoration issues and undefined future regulations add uncertainty to the

land development process. Many aspects of the property rights regime in Poland still come from the communist period, either as remains or as reactions to the previous system.

Many ambivalences exist between stated law and covenants. This feature of the Polish property market requires investors to gain practical knowledge. They need to know how to cope with that and with many other informal practices. Those inconsistencies between stated law and covenants in part result from the hastened system transformation of the 1990s. As North (1990) states: *‘wars, revolution, conquest, and natural disasters are sources of discontinuous institutional change’*. He argues further that formal rules might change, but informal ones may not. They are more rigid because informal rules had gradually evolved as extensions of previous formal rules. The consequence are inconsistencies and an ongoing tension between informal customs and the new formal rules (North, 1990, p. 91).

Our analysis supports the way the property rights in Poland and the CEE countries are characterised in the literature (Górczyńska et al., 2018; Havel, 2009; Havel, 2014, 2020, 2022; Stanilov, 2007; Sturgeon & Sikor, 2004; Verdery, 1999; Zaborowski, 2021): fuzzy, vague, hybrid, unusual, cloudy, ambiguous, imprecise, blurred. The very liberal understanding of ownership and the liberal approach to developing land, where everybody has a right to develop, allow for postponement of land development. Investors can take their time to exercise their most valuable option.

Although we focussed our analysis on Poland, many of the aspects that we discussed and many of our results may be transferable to other CEE countries. Further research is needed to find out whether the common history and the common requirement to transition from a communist to a capitalist system had similar implications for their respective property rights regimes.

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<https://doi.org/10.33119/KSzPP/2019.2.5>

Legal rules

- The act of 5 July 2018 on facilitations in the preparation and implementation of housing investments and accompanying investments, (2018).
- Act of 10 April 2003 on special principles for preparation and implementation of investments in the field of public roads, (2003).
- Act of 23 April 1964. - Civil Code., (1964).
- Act of 27 March 2003 on spatial planning and development, (2003).
- The Constitution of the Republic of Poland, (1997).

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Figure 2: Events and institutions on the timeline.

Table 1. Elements of property right regime and its impact on land development

